IN THE

Supreme Court of the United States

October Term, 1945

No.....

MARTIN LEITHAUSER, ADMINISTRATOR OF THE ESTATE OF P. J. LEITHAUSER, DECEASED,

Petitioner,

vs.

HARTFORD FIRE INSURANCE COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE

This action was filed by petitioner upon a policy of fire insurance issued by respondent. Without the knowledge of the respondent and contrary to the express terms of the policy, a chattel mortgage existed on the insured property, both at the time the policy was issued and at the time the property was destroyed by fire. Respondent defended on that issue.

The mortgage in question was on a building owned by petitioner standing on ground leased by him from The Baltimore & Ohio Railroad Company, and under Ohio law was filed as a chattel mortgage.

The only material fact in issue in the trial court was the existence of the chattel mortgage on the insured property.

The jury returned a general verdict in favor of the respondent and thus determined that issue and all questions of fact adversely to the petitioner (R. 77).

OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The opinion of the Circuit Court of Appeals,—(R. 527; 149 F. 2d 152) is brief and reads as follows:

> "*Per Curiam.*
>
> "This case came on to be heard upon the record, briefs and oral argument of counsel.
>
> "And it appearing that without the knowledge of the insurer and in violation of the terms of the policy, a chattel mortgage existed upon the insured property at the time the policy was issued and at the time of the fire;
>
> "And it appearing that Section 9583, General Code of Ohio, does not preclude the assertion by the appellee of the defense that a chattel mortgage was outstanding on the insured structure, *Sun Fire Office of London vs. Clark*, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562; *Webster vs. Dwelling House Ins. Co.*, 53 Ohio St. 558, 42 N. E. 546, 30 L. R. A. 719, 53 Am. St. Rep. 658; *Germania Fire Ins. Co. vs. Werner*, 76 Ohio St. 543, 81 N. E. 980, 12 L. R. A., N.S., 456, 118 Am. St. Rep. 891.
>
> "It is ordered that the judgment be, and it hereby is, affirmed."

MATERIAL PROVISIONS OF POLICY

The material provisions of the policy involved in the case are standard uniform clauses which read:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple" (Ex. 1, R. 83, R. 271).
>
> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become encumbered by a chattel mortgage" (Ex. 1, R. 83, R. 271).
>
> "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire" (Ex. 1, R. 88, R. 271).

REASONS WHY WRIT SHOULD BE DENIED

I. The decision of the United States Circuit Court of Appeals for the Sixth Circuit is not in conflict with the applicable local law, but is directly in accord with the settled decisions of the Supreme Court of Ohio as set forth in the following cases:

The Sun Fire Office of London vs. Clark, 53 O. S. 414;

Webster vs. Dwelling House Ins. Co., 53 O. S. 558;

Germania Fire Ins. Co. vs. Werner, 76 O. S. 543.

II. There is no special or important reason for the granting of this writ, and there is no federal question involved.

III. The case has been in the courts nearly fifteen years and it is time the litigation was finally terminated. It was tried three times in the District Court (each time adversely to petitioner), reviewed three times in the Circuit Court of Appeals for the Sixth Circuit (78 F. 2d 320; 124 F. 2d 117; 149 F. 2d 152), and twice failed of *certiorari* in this court (296 U. S. 645; 316 U. S. 663). One District Court opinion is reported (29 Fed. Supp. 401). (For chronological history of this litigation, see appendix to this brief.)

IV. Justice has been done in the courts below.

ARGUMENT

UNDER THE OHIO LAW, WITH WHICH THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS IS IN ENTIRE ACCORD, SECTION 9583 OF THE GENERAL CODE, THE VALUED POLICY STATUTE, DID NOT PRECLUDE THE ASSERTION BY RESPONDENT OF THE CHATTEL MORTGAGE DEFENSE. THE STATUTE HAS APPLICATION TO THE PHYSICAL CONDITION OR PHYSICAL CHANGES IN THE INSURED PROPERTY AND IN NO WAY RELATES OR APPLIES TO MORTGAGES OR OTHER ENCUMBRANCES ON THE PROPERTY.

The provisions of General Code, Section 9583 (sometimes cited in the cases as 3643 Rev. Stat.), are as follows:

> "*Extent of liability under policy.* A person, company or association insuring any building or structure against loss or damage by fire or lightning, by renewal of a policy, shall cause such building or

structure to be examined by his or its agent, and a full description thereof to be made, and its insurable value fixed, by him. In the absence of any change increasing the risk without the consent of the insurers, and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurer received a premium, shall be paid."

Notwithstanding petitioner's complete reliance on this statute, we state unhesitatingly that it has no bearing whatever upon the validity of the chattel mortgage defense.

CONTROLLING DECISIONS OF SUPREME COURT OF OHIO

The decisions of the Supreme Court of Ohio in the cases of *The Sun Fire Office of London vs. Clark*, 53 O. S. 414; *Webster vs. Dwelling House Ins. Co.*, 53 O. S. 558; and *Germania Fire Ins. Co. vs. Werner*, 76 O. S. 543, are clear, definite and decisive. They hold that the "examination" of the property referred to in the first sentence of the valued policy statute, and the "change" mentioned in the second sentence of the statute, relate to the physical condition of the insured property and not to the matter of encumbrances.

Paragraphs 6 and 7 of the syllabus of the *Webster* case read thus:

> "6. The examination required to be made by the agent of an insurance company by Section 3643, Revised Statutes, relates to the physical condition of the property such as an inspection would disclose, and does not relate to the matter of incumbrances. The 'change' mentioned in the statute refers to some physical change in the insured property, its use, or its surroundings and does not relate to a change respecting incumbrances.

> "7. Where a policy of insurance stipulates that if any part of the property shall be incumbered by mortgage without the consent of the company, the policy shall be void, such stipulation is not within the provision of Section 3643. And if, after the issuing of the policy and before the loss such incumbrance is created by the insured without the consent of the company, the policy is thereby invalidated."

The *Webster* case has never been overruled or modified. It is in accord with the decision of the Supreme Court of Ohio in *The Sun Fire Office of London* case, in which the third paragraph of the syllabus reads as follows:

> "3. Where a policy of insurance stipulates that it shall become void by the taking of additional insurance without the consent of the insurer, such stipulation is not within the provisions of Section 3643, Revised Statutes, for the reason that additional insurance does, as a matter of law, increase the risk; and if taken without the consent of the insurer, invalidates the policy."

The last authoritative pronouncement of the Supreme Court of Ohio on this subject was in the *Germania Fire Ins. Co. vs. Werner* case. The first paragraph of the syllabus of that case is as follows:

> "1. The words 'any change increasing the risk,' which occur in Section 3643, Revised Statutes, refer only to change in the insured building or structure itself, and were not intended to include or apply to, anything distinct from, or accidentally related to, the corpus of the insured building or structure."

The foregoing decisions are the controlling Ohio cases on the point in issue. They are the last decisions on the subject. The cases relied upon by petitioner are all prior in point of time, are distinguishable upon their facts, and

most of them are lower court decisions, some of which were affirmed by the Supreme Court without opinion. They are of no authoritative value on the question at issue. If they in any way sustain petitioner's argument, which we deny, they have lost all significance because they are inconsistent with or overruled by the later decisions of the Supreme Court. The Circuit Court of Appeals for the Sixth Circuit was entirely correct in disregarding them and in citing the last, controlling expressions of our Supreme Court.

THE CHATTEL MORTGAGE PROHIBITION IN THE POLICY IS A VALID PROVISION AND THE VIOLATION THEREOF RENDERED THE POLICY VOID AND UNENFORCEABLE

The verdict of the jury establishes that there was a chattel mortgage on the insured premises without the knowledge of the respondent (R. 77). The policy specifically prohibited such a mortgage (Ex. 1, R. 83, R. 271).

The respondent had a right to contract against this hazard and the violation of the terms of the policy voided it.

In *Sun Insurance Office vs. Scott,* 284 U. S. 177, the first headnote reads as follows:

> "1. A provision in a policy of fire insurance prohibiting the placing of a chattel mortgage on the insured property without the consent of the insurer endorsed on the policy is valid, and its violation constitutes a complete defense to an action upon the policy for a loss."

See also *Auto Insurance Co. vs. VanBuskirk,* 115 O. S. 598, which is to the same effect.

IT IS IMMATERIAL WHETHER THE MORTGAGE WAS ON THE PREMISES AT THE TIME THE POLICY WAS ISSUED OR WAS PLACED THEREON AT A LATER DATE

Petitioner's effort to distinguish between a prior existing mortgage and one created after the issuance of the policy is without merit. The policy specifically covered both contingencies. The language of the prohibition is that the policy shall be void "if the subject of the insurance * * * be or become encumbered by a chattel mortgage." (Ex. 1, R. 83.) See *Hickey vs. Dwelling House Ins. Co.*, 20 O. C. C. 385, page 390.

CONCLUSION

The principles of law which control the decision of the Circuit Court of Appeals for the Sixth Circuit in this case are clearly set forth in the last statements thereof by the Supreme Court of Ohio. (See opinion of Circuit Court of Appeals, R. 527; 149 F. 2d 152.) There is no conceivable conflict between the decision of the Circuit Court of Appeals in this case and those decisions of the Supreme Court of Ohio. They are in complete harmony.

The question involved is one of local law only upon which the Supreme Court of Ohio has passed in clear and unmistakable language.

There is no federal question involved.

There is no special or important reason for the allowance of the writ prayed for, nor is there any question of great public importance involved. *Magnum Co. vs. Coty*, 262 U. S. 159, page 163.

The petition for writ of *certiorari* should be denied.

Respectfully submitted,

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